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JUNG KWAK

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. WILLIAM McCURINE, JR.)**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNG KWAK,

Defendant.

Case No. 09-CR-2646-JLS (WMC)

**MOTION FOR PRETRIAL
RELEASE**

TO: KAREN HEWITT, United States Attorney for the Southern District of California,
and MITCH DEMBIN, Assistant United States Attorney

I.

Introduction.

The grand jury has returned a single count conspiracy indictment against
Jung Kwak and two other individuals. The charges revolve around an alleged effort by

1 Mr. Kwak, through his San Diego based business, to hack a computer code used by the
2 DISH network to encrypt its pay-for-view satellite television programming, so as to
3 potentially increase sales of his competing receivers.
4

5 Although this case does not involve any violent crime or illegal narcotics, and
6 despite the fact that Mr. Kwak is a United States Citizen with a minimal criminal record,
7 despite the fact that the charges carry a maximum penalty of five years, and despite
8 Mr. Kwak's long-standing family, personal and business ties to the community, the
9 government is requesting pretrial detention pursuant to 18 U.S.C. § 3142 based on an
10 alleged risk of flight. The Court should deny this request and set reasonable conditions
11 of release.
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14 II.

15 The Bail Reform Act/18 U.S.C. § 3142

16 A. *The Government Must Prove a Serious Risk of Flight*

17 As the Court knows, pretrial release is controlled by the Bail Reform Act of 1984,
18 codified in 18 U.S.C. § 3141, *et. seq.* Under this statute, the Court "shall order the pretrial
19 release" on "personal recognizance, or upon execution of an unsecured appearance bond
20 in an amount specified by the court" "unless the judicial officer determines that such
21 release will not reasonably assure the appearance of the person as required or will
22 endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). In such
23 cases, the Court can set conditions of release including the requirement that the bond be
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1 secured by signatures, cash or real property.

2 Pretrial detention is authorized only under the most extreme conditions. Three
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4 important principles have long governed bail considerations, as recognized by the
5 Ninth circuit:

6 “1. Federal law has traditionally provided that a person arrested for a
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8 non-capital offense shall be admitted to bail.

9 2. Only in rare cases should release be denied.

10 3. Doubts regarding the propriety of release are to be resolved in favor
11
12 of defendants.”

13 *United States v. Townsend*, 897 F.2d 989, 993-994 (9th Cir. 1990) (citations omitted).

14 Bail may be denied only in cases involving proof that a defendant poses a serious risk of
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16 flight or danger to the community. 18 U.S.C. § 3142(f). Under subsection (f), the Court is
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18 required to hold a detention hearing upon the government’s motion if the case involves
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20 certain charges such as a crime of violence, a drug trafficking crime for which the
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22 maximum sentence is at least ten years, any crime for which the maximum sentence is life
or death, etc. Under certain circumstances, the Court must apply a rebuttable presumption
the defendant should be detained. *See* § 3142(e)(2) and (3).

23 This case does not involve either an offense for which the government is
24
25 automatically authorized to seek detention or an offense for which detention is presumed.

1 Thus, “there is a statutory presumption that [the defendant] should be released pending
2 his trial.” *United States v. Giordano*, 370 F. Supp. 2d 1256, 1261 (S.D. FL. 2005).

3
4 Because this case does not qualify for a detention hearing under 3142(f)(1), the
5 **only possible grounds** for detention are found in Section 3142(f)(2), which requires the
6 government to establish a “**serious risk** that such person will flee” or “a serious risk that
7 such person will obstruct or attempt to obstruct justice, or threaten, injure or intimidate. . .
8 a prospective witness or juror.” (Emphasis added). See *Giordano* at 1262; accord
9 *United States v. DeBeir*, 16 F. Supp. 2d 592, 594 (D. Md. 1998) (“[The Act] allows
10 dangerousness to justify detention only for those individuals who fall within the carefully
11 delineated categories set forth in § 3142(f)(1), rather than those who pose a risk of flight
12 or risk of obstruction of justice under (f)(2)”).

13
14 In this case, the government has not alleged a serious risk of obstruction of justice,
15 and therefore any request for detention **must** be limited to proof of a **serious** risk of flight
16 sufficient to establish that no condition or combination of conditions could be set to
17 reasonably assure Mr. Kwak will appear at any future court hearings. *United States v.*
18 *Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996) (proof must go to the “**ultimate issue**: that no
19 combination of conditions – either those set out in the Bail Reform Act itself or any
20 others that the magistrate or judge might find useful – can ‘reasonably’ assure that the
21 defendant will appear for trial”) (emphasis added). As the Court of Appeals for the Ninth
22 Circuit emphasized almost twenty-five years ago, “the procedures under section 3142 of
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1 the Act must be *strictly followed* as a precondition to detention.” *United States v.*
2 *Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985) (emphasis added).
3

4 ***B. The Factors the Court Must Consider***

5 Once it hears the evidence from both sides, the Court must consider four factors in
6 determining whether to order an individual jailed without bail pending trial:

7 “(1) the nature and circumstances of the offense charged, including whether
8 the offense is a federal crime of terrorism; (2) the weight of the evidence
9 against the person; (3) the history and characteristics of the person,
10 including the person's character, physical and mental condition, family and
11 community ties, employment, financial resources, past criminal conduct,
12 and history relating to drug or alcohol abuse; and (4) the nature and
13 seriousness of the danger to any person or the community that would be
14 posed by the defendant's release.”
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18 *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008).

19 The 3142 factors weigh heavily in favor of setting conditions of pretrial release.
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21 ***i. The Nature and Circumstances of the Charges Support Bail***

22 The charge here is an alleged conspiracy to hack the Dish network computer code
23 to increase sales of satellite television boxes, hardly the type of charge that cries out for
24 detention. There are no violence, drugs, or terrorism charges. The conspiracy charge
25 carries a five year maximum penalty, a very modest maximum sentence by federal
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standards, as many criminal statutes carry maximum sentences of 10 years 20 years, or life. Mr. Kwak would not risk the loss of bond resources posted for him, nor the risk of significantly compounding his problems by running from this charge.

The charges do not relate to terrorism or other violent crimes, nor to drug trafficking, nor are there any allegations of witness tampering, evidence tampering, obstruction of justice, or efforts to flee.

ii. The Weight of the Evidence

Of course, the weight of the evidence is “the least important of these various factors, however, and the statute neither requires nor permits a pretrial determination that the person is guilty.” *United States v. Cardenas*, 784 F.2d 937, 939 (9th Cir. 1986); *c.f. Stack v. Boyle*, 342 U.S. 1, 5, 96 L. Ed. 3, 72 S. Ct. 1 (1951) (“Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”) Mr. Kwak merely emphasizes that he intends to mount a vigorous defense. Further evincing his willingness to stay and confront this problem directly, Mr. Kwak and his family have pooled resources to hire three attorneys to defend himself against the allegations.

iii. Mr. Kwak’s History and Characteristics Reflect his Ample Ties to the Community

Mr. Kwak is a 32 year old United States Citizen. Although born in South Korea, he was brought to this country when he was just a little boy and has lived here ever since.

1 His father passed away when he was a small child, his mother and sister live in the United
2 States; he does not know his family in Korea and only speaks rudimentary Korean.

3
4 He has no significant criminal record. He has no history of violence. He has no
5 history of drug abuse. He has no history of alcohol abuse or mental illness. Mr. Kwak
6 owns a residence and a substantial business in San Diego and has numerous friends and
7 family living here. Unlike many defendants in this district, Mr. Kwak has no ties to
8 Mexico, which poses a significant temptation for flight to those who speak the language,
9 share the culture, and have family and other support networks right across the border.
10

11 Mr. Kwak has strong ties to the community, as attested to in the numerous support
12 letters (attached), having lived and worked in the San Diego region nearly all of his entire
13 adult life. Several individuals took the time to write personal letters to the Court in the
14 last couple of days, and the overwhelming theme is that Mr. Kwak is genuinely friendly
15 and a generous individual who is extremely loyal to his family. As highlighted in the
16 letters, these individuals view Mr. Kwak as:
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19 – “the type of friend you can only hope to have in your circle of friends,” “always
20 very encouraging and insisted that God had a better plan for me;” “I feel like I owe
21 Jung a great deal for helping me change my life around” [Ethan Morris];
22
23 – a “devoted friend” who “touches the lives of others and is always there with a
24 helping hand in a time of need” [Gina Kang];
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1 – “a strong role model” and someone who “makes you want to help others”

2 [Charlie Kim];

3
4 – a “kind and generous” person with “a loving heart” who “has always been by
5 side” and “I could trust him with my life” [Hana Kim];

6 – “dependable, responsible, honest and courteous” [Gent Paparisto];

7
8 – “in high school he worked part time to help support his family . . . while playing
9 on the high school football team and maintaining good grades;” since his father’s
10 death, “Jung has taken responsibility for his mother and sister’s welfare;” he is
11 “the best nephew anyone could hope to have” [Danial Pierce]

12
13 – a “hard-working man,” “very respected by the local businesses;” in the “eight
14 plus years that we have known and befriended Junk Kwak he has shown us
15 nothing but loyalty, honesty, integrity and an oversized kind heart” [Tom Ratowski
16 and Derek Mascia];

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18 – “I gave him a chance in an entry level job [in 1998]. He rewarded my
19 confidence in him by exceeding objectives and moving into a more senior position
20 within a short amount of time.” “I am so impressed with the love he has for his
21 family,” “he works hard so his mom does not have to work” [Robert Rhine];

22
23 – “a big man with a big heart,” “extremely generous and caring for his family,
24 friends and anyone that he meets” [Tom Robic];

25
26 Given this support, Mr. Kwak’s history and characteristics weight strongly in favor
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1 of setting bond.

2 ***iv. Danger Posed to Other Individuals by Release is non-existent***

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4 Mr. Kwak does not expect the government to present any evidence of danger to
5 other individuals as a risk of his release. That is because he does not pose a danger or
6 threat to any witness or any other individual in the community, and thus this last factor
7 weighs in favor of setting bond.
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9 Finally, as a practical matter, the Court should consider this business-related case
10 involves multiple defendants and is likely to involve voluminous discovery. Given the
11 large amount of discovery to review as well as the investigation the defense must pursue,
12 and in consideration of the volume of criminal cases clogging the courtrooms in this
13 district, it is unlikely this case will make it to trial for many months. The expected length
14 of the proceedings is relevant to bail. *See United States v. Clymer*, 25 F.3d 824, 828 n. 3
15 (9th Cir. 1994) (“It is simply intolerable for a defendant - who may ultimately be found
16 innocent - to be forced to spend almost a year and a half in jail before he has any
17 opportunity to present his case”).
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21 **III.**

22 **The Court Should Set Conditions of Release**

23 Respectfully, Mr. Kwak suggests this case is not even a close call for bail.
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25 Mr. Kwak’s circumstances are an even more compelling case than that confronted by the
26 Ninth Circuit in its seminal bail case, *United States v. Motamedi*, 767 F.2d 1403 (9th Cir.
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1 1985). In *Motamedi*, the court reversed the district court's order of detention despite
2 charges of conspiracy and *exportation of arms*. As a later case summed the up the facts,
3 the Circuit noted Mr. Motamedi, an Iranian citizen,
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5 had been living in the Los Angeles area, where he was indicted, for
6 nine years; that he had applied for citizenship; that he had approximately
7 85 relatives in the Los Angeles area, including his wife, parents and
8 brothers; that he offered evidence disputing the government's allegation
9 that he could return to Iran; that his parents had posted their residence in
10 Los Angeles as security on a \$ 750,000 bond; that he had no prior criminal
11 record and no history of alcohol or drug abuse; and that he had known of
12 the government's investigation since January 1984 and had nonetheless not
13 fled the country.
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17 *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). Despite evidence that
18 Motamedi was purchasing arms for the Iranian government and continued to do so after
19 being warned by U.S. Customs and the F.B.I., the appellate court ordered bail set. *Id.*
20 Here, by contrast, Mr. Kwak is a United States Citizen involved not in arms smuggling
21 but in a case alleging efforts to promote satellite receiver sales to Americans, and he has
22 longstanding ties to the community and tremendous community support.
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25 We have been lead to believe the government is going to proffer that Mr. Kwak has
26 secreted hundreds of millions of dollars in accounts in Korea and has grossed 750 million
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1 dollars from his satellite receiver sales. We proffer that this information is incorrect
2 and hold the government to it's obligation to provide proof at the time of the hearing.
3
4 Mr. Kwak has no bank accounts in Korea .We believe the government may have been
5 confused by funds that were sent to Korea to purchase the satellite receivers. Finally,
6 Mr. Kwak's two codefendants were arraigned and released on \$1000.00 personal
7 surety bonds.
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9 **IV.**

10 **Conclusion**

11 Mr. Kwak respectfully urges the Court to deny the government's request for
12 detention. Undersigned counsel is working with proposed sureties and will propose
13 conditions of release that will reasonably assure Mr. Kwak's presence at all future
14 court hearings.
15

16
17 Dated: July 15, 2009

Respectfully submitted,

18 s/Michael Pancer

19 _____
20 MICHAEL PANCER

21 DAVID CLARK

22 Attorneys for Defendant
23 JUNG KWAK
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